D.B. CIVIL SPECIAL APPEAL (W) NO.98/2005
Kisturmal Bagari Vs. Bharat Sanchar Nigam Limited (BSNL)
and others.

Date : 04.05.2007

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE BHANWAROO KHAN

Mr. Sanjeev Johari for the appellant.
Mr. Jagdish Vyas) for the respondents.
Mr. V.K. Mathur)

We have heard learned counsel for the parties.

The only issue raised in this appeal is whether the appellant is entitled to count the services rendered by him with the Indian Army between 14.8.1974 to 19.8.1977 as a qualifying service towards pensionary benefits.

The appellant had joined the Indian Army Medical Corps during 14.8.1974 to 19.8.1977. After detachment he joined the civil service under the department of Telecom on 25.11.1980 as Time Scale Clerk under the Central Government. On the formation

of Bharat Sanchar Nigam Limited (BSNL), the petitioner's services came under the BSNL wherefrom he retired on 30th September, 2000 and his pensionary benefits were computed on the basis of services rendered by him since 25.11.1980. No benefit of service rendered by him under the Indian Army was given.

This led to filing of the present writ petition seeking a mandamus that the services rendered in the Indian Army by the petitioner be counted as qualifying service for the purpose of computing his pensionary benefits under BSNL. The writ petition was dismissed by non-speaking order. Hence, this appeal.

The contention on behalf of the respondent-Corporation has been that the services of the petitioner rendered under Indian Army can be counted as a qualifying service for the purpose of computing his pensionary benefits under Rule 19. Under Rule 19, the petitioner was required to give his option either to continue to draw the military pension or retain gratuity, received on discharge from military services, in which

case his former military services shall not be counted as qualifying service; or to opt to cease to draw his pension and refund the pension already drawn. On this being done, the services rendered under military shall be counted for the purpose of computing qualifying service for pension.

The issue was noticed by the Court before issuing notice and since no submission has been made in this respect, the petitioner was given a chance to clarify this position. In response to the aforesaid enquiry, the appellant submitted an affidavit that from Indian Army he did not get any gratuity, commutation or any other retiral benefits throughout and he had also stated in his affidavit dated 8.1.2006 that after joining the services of the department of telecommunication as above, the appellant/petitioner there submitted his option that his past services with Indian Army (as above) may be counted on the continuous basis for fixation of pay and pension in the future. It was further submitted that since any amount of pension, gratuity, commutation and other retiral benefit was never received by the

appellant/petitioner, the question of refund of the same does not arise.

No response has been made to this affidavit. In the aforesaid circumstances, we are of the opinion that in terms of Rule 19 of the CCS (Pension) Rules, the petitioner was entitled to receive the pensionary benefit. The Rule 19 has been framed keeping in view that ex-military servant, who is reemployed in a civil service is entitled to count the past military service but he may not be allowed to avail two benefits simultaneously.

Apparently, if he was discharged from military services on retiral benefits by way of pension or gratuity and his withdrawing the same, he cannot continue to draw benefit from his parent department and compute the same for the purpose of getting retiral benefits from later department also. He has to choose to draw one benefit but where he has not drawn any benefit from parent department, the real question is not of drawing two benefits from the parent department as well as later department.

In the present case the petitioner-appellant's affidavit that he had submitted no option under rule, stand un-rebutted. Hence, in terms of Rule 19 he became entitled to claim benefit of computing period of his service under Indian Army as qualifying service.

In the facts and circumstances of the present case even if the petitioner had not submitted any option, presumption that he has opted to retain his retiral benefit from army cannot be drawn. The presumption raised under rule is rebutable and can be so rebutted by circumstances itself. In the present case since the appellant has admittedly not drawn any retiral benefit form his service under army there was nothing to opt for him to retain or not retain.

In the present present case, the petitioner has definitely averred in his affidavit dated 6.1.2006 after the dispute was made in support of reply on 5.11.2005 that he submitted his option and he has not drawn any benefit of service from military, therefore, the

question of refund does not arise.

The petitioner is entitle to count the period of service rendered under the Indian Army Medical Corps from 14.8.1974 to 19.8.1977 towards qualifying service for the purpose of pensionary benefits when he retired from BSNL. Since the said benefit has not been given, the retiral benefits of the petitioner will be recomputed and the difference of retiral benefits payable as per re-computation may be paid to the petitioner within a period of 3 months. In case such beneit is not extended to the petitioner within said period, he will be entitled to interest on arrear @ 9% per annum with effect from the date of filing of the writ petition to the date of payment.

Accordingly, judgment under appeal is set aside. Appeal and writ petition are allowed as aforesaid. No order as to costs.

[BHANWAROO KHAN], J. [RAJESH BALIA], J.

babulal/